BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Petition for Declaratory Ruling	)	**MM DOCKET NO. 92-254**
Concerning Section 312(a)(7)	)	
of the Communications Act	)	

TO: The Commission

COMMENTS

Daniel Becker (hereinafter "Becker"), files these comments in response to the Commission's Public Notice Request For Comments (Request for Comments) in this docket released October 30, 1992. Specifically, the Commission seeks comments on:

1. What, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent?

2. Whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children?

A. Background.

This Request For Comments was instigated by two matters currently pending before the Commission. The first is an Application For Review filed by Kaye, Scholer, Fierman, Hays & Handler (Kaye, Scholer), of Commission action taken by the Chief of the Mass Media Bureau in a letter on August 21, 1992 (FCC Ref. 8210-AJZ/MJM). In its letter, the Commission declined to grant Kaye, Scholer's July 29, 1992 Petition for Declaratory Ruling requesting Commission approval to "channel" political ads that present graphic depictions of dead or aborted and bloody fetuses

or fetal tissue into those hours when there is no reasonable risk of children being in the audience.

The second matter instigating this Request For Comments was a letter ruling by the Chief of the Mass Media Bureau issued October 30, 1992 (Ref. DA92-1503) in response to a complaint on behalf of Daniel Becker, a candidate for Congress for the Ninth District of Georgia, against Gillett Communications of Atlanta, licensee of WAGA-TV in Atlanta (Gillett). Becker filed the complaint because Gillett refused to air Mr. Becker's political program, "Abortion in America: The Real Story," on November 1, 1992 between 4:00 and 5:00 p.m. as requested. Gillett claimed that broadcast of the program would violate the indecency prohibition contained in 18 U.S.C. § 1464. Gillett offered to provide price and availability information for airing the program between midnight and 6:00 a.m. (what it considered to be safe harbor) but otherwise refused to air the program as requested.

The Commission declined to render an indecency ruling on the tape submitted by Becker, "Abortion In America: The Real Story," since the program had not been aired.[1] It noted the competing statutory demands of the Communications Act on the one hand, which requires reasonable uncensored access to broadcast facilities by federal candidates, and the Federal Criminal Code on the other hand, which prohibits the broadcast of indecent

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[1] The Commission staff had determined only weeks earlier that another similar shorter Becker political advertisement was not indecent. See Gillett Communications of Atlanta, Inc. and Kaye, Scholer, Fierman, Hays & Handler, DA92-1160 (MMB, released August 21, 1992).

material.[2] Unwilling to resolve the conflict, and accepting Gillett's determination at face value that the Becker program is indecent, the Commission permitted Gillett and all other broadcasters not to air "outside the safe harbor material that it reasonably and in good faith believes is indecent." The Commission did note that, in an effort to resolve the conflict between reasonable access provision of the Communications Act and the prohibition against broadcasting indecent material, it would,

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[2] 47 U.S.C. §§ 312(a) and 315(a) provide:

> The Commission may revoke any station license or construction permit -- (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amount of time for the use of a broadcasting station by a legally qualified candidate for Federal Elective office on behalf of his candidacy. 47 U.S.C. § 312(a)
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> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section.
> 47 U.S.C. § 315.

18 U.S.C. § 1464 provides:

> Whoever utters any obscene, indecent or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Violation of either statute constitutes grounds for revocation of a broadcaster's FCC license.
47 U.S.C. §§ 312(a)(6) and (7), 315.

by public notice, seek "public comment on these matters to enable it to address them fully" which is the subject of this Docket.[3]

The subject matter raised by Becker in his complaint is being addressed collaterally in the Federal Courts. On October 28, 1992, Gillett filed a Complaint For Declaratory Judgment Injunction and Application For Temporary Restraining Order in the United States District Court for the Northern District of Georgia against Becker. Gillett sought no relief with the FCC. Late in the afternoon of October 30, 1992, the District Court issued an Order granting injunctive relief and holding that "Abortion In America: The Real Story" is indecent. Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV v. Daniel Becker, Becker for Congress Committee and the Federal Communications Commission, 1:92-CV-2544-RHH, slip opinion (N.D. Georgia, October 30, 1992), appeal docketed No. 92-9080, October 30, 1992. Becker then filed, on October 31, 1992, an Appeal of the District Court order to the United States District Court of Appeals for the Eleventh Circuit. Becker argued that the District Court lacked jurisdiction, that the political advertisement was not indecent, that the District Court's order was an overbroad restriction of Becker's First Amendment rights. The FCC filed a Notice of Appeal on December 28, 1992.[4]

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[3] Becker filed an Application For Review on December 3, 1992, which is currently pending, of the Commission's October 30, 1992 ruling.

[4] Becker also filed a Petition For Extraordinary Writ to the United States Court of Appeals for the Eleventh Circuit and with the United States Supreme Court, which were both denied.

B. Comments.

The Commission has requested comment on all issues concerning "what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent." The Commission also seeks comment on whether a broadcaster should have the right to channel materials that, while not indecent, may otherwise be harmful to the children.

It is critical, in evaluating whether to give broadcasters discretion to censor political speech and then channel it, to keep in mind the importance of uncensored political speech. CBS, Inc. v. FCC, 453 U.S. 367; CBS, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); Buckley v. Valeo, 424 U.S. 1 (1976); Monitory Patriot Co. v. Roy, 401 U.S. 265 (1971); Harrison v. Louisiana, 379 U.S. 64 (1964). Any prior restraint on a candidate's exercise of political free speech is a matter of the utmost gravity. New York Times Company v. United States, 403 U.S. 713 (1971); Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). Broadcasters should not be arbiters of political speech even when limited to the context of indecent speech. It would be too easy for a broadcaster to censor an unpopular political message under the guise that the message is indecent. It is a potential recipe for disaster to allow a broadcaster that already has tremendous power to influence through its programming to judge the content of political expression. The economics of broadcasting argue against any objective evaluation of a political message which may be unpopular. Indeed, Gillett

underscores this concern in its Opposition to the December 2, 1992 Application For Review filed by Becker. Gillett notes, "The first Becker spot, which WAGA aired with great reluctance, resulted in 160 telephone calls of protest to the station, all of them blaming WAGA-TV rather Becker [sic] for the airing of the spot." Opp. at para.11. It is quite evident that Gillett was concerned with the public perception of the station as a result of the political message broadcast.

Any determination whether political speech is indecent should be made by the FCC. The FCC is in the best position to apply a uniform, unbiased non-economically motivated standard of what is and what is not indecent political speech. Unlike obscenity, indecency is not an issue where local standards apply.[5] If there is to be a determination of indecent political speech, it is important that such determination be made consistently and objectively with the benefit of past precedent--something far better accomplished by the FCC than by individual broadcasters. Context is crucial in making an indecency finding. See FCC v. Pacifica Foundation, 438 U.S. 726, 742 (1978). The

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[5] The Commission defines indecency as, "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd. 2705 (1987). The Commission has explained in using the term "contemporary community standards" that "it did not intend to require, as a constitutional matter, the use of any precise geographic area in evaluating material. Hence, in a Commission proceeding for indecency, in which the Commission applies a concept of 'contemporary community standards for the broadcast medium,' indecency will be judged by the standard of an average broadcast viewer or listener." Infinity Broadcasting Corporation of Pennsylvania, 3 FCC Rcd. 930, 933 (1987). See also, Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 at n. 8 (1987).

Commission has already, in the context of news broadcasts, set a higher threshold for making an indecency finding. See Peter Branton, FCC 91-27 (released January 24, 1991). Any threshold for an indecency finding in the context of political speech should be even higher.

If indecency determinations are to be made of political speech, it is not an impermissible prior restraint for the FCC as opposed to broadcasters to make that determination. The competing interest of a federal candidate to reasonable access and the time constraints of a political campaign must override any concern the Commission may have of becoming a censoring body by passing on programming not yet aired. Thus, the rationale expressed by the Commission for refusing to issue a declaratory ruling on program content prior to broadcasting in William J. Byrnes, Esq., 63 RR2d 216 (MMB June 5, 1987), aff'd, MO&O, FCC 87-215 (June 16, 1987), is inapplicable. There, Pacifica Foundation, Inc. requested a declaratory ruling on material not yet aired. It identified the material as the "Penelope" section of James Joyces Ulysses. The Commission declined to issue a declaratory ruling before broadcast of the program noting that such declaratory rulings "have the potential for becoming the functional equivalent of prior restraints on expression" and that such involvement, "is neither practical or desirable from an administrative perspective, as it involves the Commission intimately in the editorial judgments of broadcasters." Id. at para. 10. The request in Byrnes, however, was not made by a political candidate for federal office within the strict time constraints of an election.

Channeling indecent political broadcasting to early morning hours does not justify the censorship of political messages. Channeling to early morning hours may reach fewer children, but it also reaches far fewer adults. Speech that is not heard because it is restricted to a time when few will hear it, is not free uncensored speech. If the audience that political speech can reach is severely limited, the speech for all practical purposes is censored. This is no small matter, especially in the context of a political campaign where the dissemination of an idea to as many people as possible is critical.

In sum, political speech should not be censored for indecency. If political speech is to be censored, however, broadcasters should not be the arbiters of indecent political speech. There is an inherent broadcaster bias against airing a politically unpopular or highly controversial messages which the broadcaster fears the public will associate with the station. Channelling speech to the safe harbor does neutralize political censorship because channelling so severely restricts the audience.

Respectfully submitted,

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